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UNITED STATES SENTENCING COMMISSION  
MEETING ON RETROACTIVITY

WASHINGTON, D.C.

TUESDAY, DECEMBER 11, 2007

The Commission convened at the Thurgood  
Marshall Building, Columbus Circle, N.E., Meehan  
Conference Center, Washington, D.C., JUDGE RICARDO H.  
HINOJOSA, presiding.

COMMISSION MEMBERS PRESENT:

- JUDGE RUBEN CASTILLO
- CHIEF JUDGE WILLIAM K. SESSIONS, III
- JOHN R. STEER
- DABNEY C. FRIEDRICH
- BERYL HOWELL
- MICHAEL HOROWITZ
- KELLI FERRY
- EDWARD F. REILLY, JR.

PROCEEDINGS

(3:33 p.m.)

1 CHAIR HINOJOSA: -- meeting to order. At  
2 this point, I will call on a motion to adopt the  
3 minutes from the meeting of September 20th, 2007. Is  
4 there a motion to that effect? They are before each  
5 member of the Commission.  
6

7 COMMISSIONER REILLY: So moved.

8 CHAIR HINOJOSA: Is there a second?

9 UNIDENTIFIED SPEAKER: I second.

10 CHAIR HINOJOSA: All those in favor say so by  
11 voting aye.

12 (Aye by all)

13 CHAIR HINOJOSA: Opposed?

14 (No reply)

15 CHAIR HINOJOSA: The motion carries.

16 At this point, I will call on our General  
17 Counsel, Mr. Ken Cohen, with regards to a proposed  
18 amendment to Section 1B1.10 with regards to reduction  
19 in term of imprisonment as a result of an amended  
20 guideline range. Mr. Cohen?

21 MR. COHEN: Thank you, Judge. Before you is  
22 a proposed amendment to 1B1.10 (indiscernible) covering  
23 reduction in term of imprisonment as a result of an  
24 amended guideline range. The proposed amendment  
25

1 clarifies when and to what extent a reduction in  
2 sentence is consistent with the policy statement and,  
3 therefore, authorized under 18 U.S.C. Section  
4 3582(c)(2).

5           Specifically, the amendment clarifies  
6 circumstances in which a defendant is eligible for  
7 consideration for a sentence reduction under 18 U.S.C.,  
8 Section 3582(c)(2), Title 18. It clarifies  
9 circumstances in which defendants are excluded from  
10 such consideration.

11           It clarifies the limitations on the extent of  
12 any reduction that is consistent with the policy  
13 statement and, therefore, authorized under 18 U.S.C.  
14 3582(c)(2) and, more clearly, giving the  
15 (indiscernible) factors for consideration by the Court  
16 when determining if and to what extent a sentencing  
17 reduction is warranted, including public safety  
18 consideration.

19           A motion to adopt the proposed amendment to  
20 18 U.S.C. would be in order with an effective date of  
21 March 3, 2008, and with staff being authorized to make  
22 technical and conforming changes.

23           CHAIR HINOJOSA: Is there a motion to that  
24 effect?

25           UNIDENTIFIED SPEAKER: Also moved.

1 CHAIR HINOJOSA: Is there any discussion?

2 COMMISSIONER STEER: Mr. Chairman, I'd like  
3 to make a brief comment on this. This is a very  
4 important vote in my mind, both with respect to votes  
5 that may follow on the amendments that are being  
6 considered for retroactivity today and in the future.  
7 I think this revision or the revisions to the policy  
8 statement strengthen it in several significant ways to  
9 emphasize the circumstances and the limitations on  
10 judicial authority to reduce sentences under Section  
11 3582(c)(2).

12 Important for me and many of us, I imagine,  
13 is that it makes public safety a central concern upon  
14 which the Court should focus in determining whether and  
15 by how much within the limits authorized by the  
16 Commission sentences may be reduced. And in light of  
17 the Booker case and its progeny, it does as much as  
18 reasonably we can be done -- or can be done by us to  
19 outline the special limited nature of this remedial  
20 procedure and the manner in which the Commission  
21 believes the authority may be exercised consistent with  
22 the Sentencing Reform Act.

23 I'd like to congratulate our staff on what I  
24 think was an excellent job of redrafting the policy  
25 statement and thank the Commissioners for their well

1 | considered input.

2 | CHAIR HINOJOSA: Is there any further  
3 | discussion on this? If not, I call a vote. All those  
4 | in favor say so by voting aye.

5 | (Aye by all)

6 | CHAIR HINOJOSA: Opposed?

7 | (No reply)

8 | CHAIR HINOJOSA: The motion carries with at  
9 | least four members voting for adoption.

10 | At this point, it would be in order since we  
11 | are considering the possible retroactivity of two  
12 | guidelines amendments to have a vote to temporarily  
13 | suspend rules 2.2 and rules 4.1 of the Rules of  
14 | Practice and Procedure as they pertain to decisions  
15 | regarding retroactivity, and I will call on Mr. Cohen,  
16 | our General Counsel, with regards to an explanation.

17 | MR. COHEN: Thank you, Judge. On April 18th,  
18 | 2007 and April 27th, 2007 the Commission promulgated  
19 | certain amendments to the guidelines that have the  
20 | affect of lowering the guideline range for certain  
21 | offenders, specifically Amendment 706 relating to crack  
22 | cocaine offenses and Amendment 709 relating to certain  
23 | criminal history rules.

24 | Rule 4.1 of the Commission's Rules of  
25 | Procedure provides that in those cases in which the

1 Commission considers an amendment for retroactive  
2 applications (indiscernible), it's to decide when  
3 (indiscernible) retroactive at the same meeting.

4           And Rule 2.2 also provides that  
5 (indiscernible) to prepare a Retroactivity Impact  
6 Analysis (indiscernible) that would require the  
7 affirmative vote of at least three members at a public  
8 meeting. The Commission did not vote on retroactivity  
9 or instruct staff (indiscernible) retroactivity Impact  
10 Analysis at either the April 18 or April 27 meeting.  
11 However, on July 31, 2007 and again on September 27,  
12 2007 the Commission published and issued for comment in  
13 the Federal Register requesting comment regarding  
14 either the amendment change -- whether either amendment  
15 change (indiscernible) rules or the amendment regarding  
16 offenses involving cocaine base (indiscernible) to be  
17 included in Subsection (c) of the policy statement  
18 1B1.10 as amendment to (indiscernible) retroactive to  
19 the previous (indiscernible).

20           The Commission also requested comment  
21 regarding whether if it were to amend 1B1.10 to include  
22 an amendment, it also should amend 1B1.10 to provide  
23 guidance to the Court on the procedure to be used when  
24 applying an amendment retroactively under 18 U.S.C.  
25 3582(c) (2).

1           The Commission received over 33,000 letters  
2 of public comment and responses to the published issues  
3 for comment. In addition, the Commission held a  
4 hearing on retroactivity on November 13, 2007 in which  
5 it heard testimony from 19 witnesses. And with that  
6 procedural background in mind, the Commission may  
7 temporarily suspend Rules 2.2 and Rules 4.1 as they  
8 pertain to retroactivity decisions under Rule 1.2 which  
9 provides that the Commission temporarily may suspend  
10 any rule contained herein and/or adopt a supplemental  
11 or superseding rule by affirmative vote at a public  
12 meeting by a majority of the voting members then  
13 serving. If the Commission wishes to do so, a motion  
14 to that affect would be in order.

15           CHAIR HINOJOSA: Is there a motion to that  
16 affect?

17           JUDGE CASTILLO: I'll so move.

18           CHAIR HINOJOSA: Is there a second?

19           UNIDENTIFIED SPEAKER: Second.

20           CHAIR HINOJOSA: Any discussion?

21           JUDGE CASTILLO: I do want to say that we  
22 have, thanks to our Chair, proceeded in a very  
23 deliberate fashion. In the minutes that were just  
24 approved I said back in September that we needed to  
25 proceed in a careful and deliberate manner.

1           When the crack amendment was approved in  
2 April and sent to Congress for possible consideration,  
3 it was literally just too soon to do the analysis that  
4 would be needed and have a public hearing to deal with  
5 the issue of retroactivity. That analysis has now been  
6 conducted. Data has been on our web site. Congress  
7 has been fully informed as to the full activities of  
8 the Commission but, more importantly, the general  
9 public was informed as we considered this issue and the  
10 Department of Justice received full consideration as  
11 shown by the amendment that we just approved.

12           I cannot think of any other way to have  
13 approached this issue. It was approached, as I said,  
14 in a careful and deliberate manner. It really calls  
15 into question one of our rules that requires that  
16 retroactivity be considered at the same time than an  
17 amendment is passed. In the future I intend to move to  
18 change that rule, but for today's purposes it is enough  
19 to suspend the operation of that particular rule.

20           CHAIR HINOJOSA: Any further discussion? If  
21 not, I'll call for a vote. All those in favor of  
22 suspending the rules as per the motion say so by  
23 stating aye.

24           (Aye by all)

25           CHAIR HINOJOSA: Opposed?

1 (No reply)

2 CHAIR HINOJOSA: The motion carries with at  
3 least four Commissioners voting in favor.

4 Next, we have posted on the agenda and have  
5 put out for public notice possible consideration of  
6 retroactivity with regards to amendments in two areas,  
7 the first being in criminal history with regards to  
8 Amendment 709, and I will call upon the General  
9 Counsel, Mr. Ken Cohen, to briefly summarize this.

10 MR. COHEN: Thank you, Judge. As I said  
11 earlier, Amendment 709 pertaining to certain criminal  
12 history rules, particularly in the area of related  
13 cases and minor offenses, have the effect of lowering  
14 the guideline range for certain offenders.

15 If the Commission wishes to add Amendment 709  
16 or any portion thereof, the list of amendments in  
17 Subsection D of policy statement 1B1.10 as the amended  
18 that may be applied retroactively, a motion to that  
19 effect would be in order with an effective date of  
20 March 3rd, 2008 and a grant of authority to staff to  
21 make technical and conforming amendments as needed.

22 CHAIR HINOJOSA: Is there a motion to make  
23 Amendment 709 retroactive? There being none, Amendment  
24 709 will not become retroactive for lack of any motion  
25 to that effect. Is there any comment that anybody

1 wishes to make with regards to this issue?

2           COMMISSIONER HOWELL: Mr. Chairman, I'd just  
3 like to make a very brief comment. I do concur with my  
4 fellow Commissioners' decision that -- not to make  
5 Amendment 709 and its multiple parts retroactive, and  
6 there are a number of reasons. I'm just going to cite  
7 three of them.

8           We gave deep consideration to whether or not  
9 Amendment 709 in all or part of its multiple facets  
10 should be made retroactive, but I have to say the three  
11 primary reasons for why I think it should not be  
12 retroactive are, first, the purpose of the amendments  
13 in 709 were really to -- largely to clarify and  
14 simplify application of the criminal history  
15 guidelines. They did not have the same kind of purpose  
16 to address the fundamental fairness in the guidelines  
17 that underline part of the crack amendment that we made  
18 that became effective on November 1.

19           Second, it was difficult to determine the  
20 magnitude of the number of offenders who might be  
21 affected by the amendment because it's difficult with  
22 our data sets to actually figure out how many different  
23 defendants or offenders currently in prison might be  
24 affected. And without the ability to really evaluate  
25 the numbers or the characteristics of the offenders who

1 might be subject to it, we would really have too many  
2 blind spots in our evaluation of retroactivity that  
3 make me uncomfortable with the deliberateness that we  
4 might be able to bring to that consideration.

5           And then, finally, and similarly one of the  
6 primary reasons, is that the difficulty of applying the  
7 Amendment 709 and its different parts to any individual  
8 defendant would have required new fact-finding and a  
9 collection of new documents potentially and the  
10 evaluation of all those documents, and it would have  
11 been extraordinarily burdensome on individual  
12 sentencing judges.

13           So for the reasons, I support the  
14 Commission's decision not to apply 709 retroactively or  
15 to entertain that motion.

16           CHAIR HINOJOSA: Any further comment?

17           COMMISSIONER STEER: Mr. Chairman, I concur  
18 entirely with the well-stated points made by  
19 Commissioner Howell, but add one other possible  
20 consideration. From the outset of the sentencing  
21 guidelines, Section 4(a)1.3, a policy statement  
22 involving invited downward departures, basically told  
23 the Courts that if they -- after calculating the  
24 criminal history score, they find that that score  
25 either overstates or understates the seriousness of the

1 defendant's actual criminal history, they are invited  
2 to depart, and I think that policy statement goes a  
3 long way to address, although perhaps not perfectly,  
4 some of the concerns which might otherwise argue for  
5 retroactivity.

6 CHAIR HINOJOSA: Any further comment?

7 (No response)

8 CHAIR HINOJOSA: There being none, we'll move  
9 to the next item which is an issue with regards to  
10 retroactivity relating to cocaine base, crack cocaine  
11 amendments, which are Amendments 706 and 711, and I'll  
12 call on our General Counsel, Mr. Cohen.

13 MR. COHEN: Thank you, Judge. Amendment 706  
14 reduced by two levels the base offense levels assigned  
15 to each quantity of cocaine base or crack cocaine  
16 listed in the Drug Quantity Table in 2(d)1.1, and a  
17 result of the amendment, the guideline ranges for the  
18 quantities that trigger the 5 and 10 year mandatory  
19 minimum penalties. Five grams and 50 grams of crack  
20 cocaine, respectively, were assigned a base offense  
21 level of 24, which corresponds to 51 to 63 months for  
22 an offender in Criminal History Category 1, and level  
23 30, which corresponds to 97 to 121 months for an  
24 offender in Criminal History Category 1.

25 On August 29, 2007, the Commission also

1 promulgated technical and conforming changes to the  
2 mechanism that had been included in Amendment 706 for  
3 determining a combined base offense level in cases  
4 involving crack cocaine and another controlled  
5 substance. Amendment 706, as amended by Amendment 711,  
6 because effective on November 1, 2007 and applies to  
7 offenders sentenced on or after that date.

8           If the Commission wishes to add Amendment 706  
9 as amended by Amendment 711 to the list of amendments  
10 in Subsection C of police statement 1B1.10 that may be  
11 applied retroactively, a motion to that effect would be  
12 in order with an effective date of March 3, 2008 and  
13 with staff authorized to make technical and conforming  
14 changes as necessary.

15           CHAIR HINOJOSA: Is there a motion to that  
16 effect?

17           JUDGE CASTILLO: I so move.

18           UNIDENTIFIED SPEAKER: Second.

19           CHAIR HINOJOSA: Any discussion?

20           JUDGE CASTILLO: I'd like to be recognized  
21 and I beg from my (indiscernible) for his indulgence as  
22 I have a statement. I'm somewhat surprised that we've  
23 reached this day. When we passed the amendment, it  
24 would seem to be an interim solution that really  
25 requested Congress to be involved and pass a

1 comprehensive solution to this issue.

2           That has not happened. It hasn't been for  
3 lack of effort. I know that many members of Congress  
4 are actively involved. I urged them to stay involved  
5 on this issue so that we can come up with a  
6 comprehensive solution.

7           Why do we need a comprehensive solution?  
8 Well, I will tell you this. I've been involved in the  
9 criminal justice system for over 30 years. Twenty  
10 years ago I was actively involved in what could be  
11 labeled the cocaine wars in Chicago to the point where,  
12 as a prosecutor, I put my life on the line with regard  
13 to dealing with cocaine traffickers.

14           Twenty years ago we were seizing millions of  
15 dollars of cocaine and making some headway in this  
16 battle. Today, as a Federal District Court Judge in  
17 Chicago, I do not see the same headway being made.  
18 Instead, I think our country has moved in the wrong  
19 direction with regard to the so-called war on drugs.  
20 We need to refocus this war.

21           I said at one of these Commission meetings  
22 that we have so penalties that are 20 years old, and I  
23 compared them, maybe unfortunately, to 20 year old cars  
24 and I said there aren't too many people driving 20 year  
25 old cars, to which some of my fellow Commissioners

1 indicated that they were, in fact, driving 20 year old  
2 cars, but those were vintage cars. Those were cars  
3 that were taken care of. Those were cars that were  
4 worth being taken care of. These penalties are not.  
5 I say this in all seriousness because the minute  
6 Congress passed this 100 to 1 ratio there were many  
7 that had second and third thoughts about it.

8 We are beholden as Commissioners to all that  
9 have worked on this, members of the public that are  
10 here, relatives of people who are serving time, other  
11 Commissioners that have come before us.

12 I brought with me today all three crack  
13 reports that this Commission has referenced. I'm not  
14 going to read them all to you, but in 1995, which  
15 strikes me as 12 years ago, this Commission indicated  
16 that there was an absence of data that would support  
17 the 100 to 1 ratio. That never has changed. No one  
18 has come before us to justify this 100 to 1 ratio. If  
19 anything, all the data, as indicated in the other two  
20 reports that I was part of issuing, has indicated that  
21 this 100 to 1 ratio is just wrong.

22 As I said, there are members of Congress that  
23 want to help us bring about a change. There are some  
24 who see the signs of change coming from the Supreme  
25 Court yesterday. I almost bit my lip reading the paper

1 today indicating that this Commission should follow the  
2 Supreme Court. I will say I beg to differ.

3           It is the Supreme Court that is following the  
4 Commission because we and those who came before us have  
5 tried to reform the drug penalties in this country and  
6 this needs to be done. Now I'm more than willing to  
7 have the assistance of the Supreme Court, but those who  
8 carefully read the Kimrough opinion that was issued  
9 yesterday, know full well that Justice Ginsburg  
10 referenced these three reports that were issued by the  
11 Commission in reaching her holding.

12           So we can -- I'll let the public decide who  
13 is following whom. It doesn't matter. The real  
14 question is are we going to come to a comprehensive  
15 solution. But in the meantime, the question is what do  
16 we do with about 19- to 20,000 individuals, human  
17 beings, people with families, people with fathers,  
18 mothers, brothers and sisters, who we know can benefit  
19 from a retroactive application.

20           I would sit here all day if I were to go  
21 through all the issues that would support retroactive  
22 application. I think they are manifest. I applaud the  
23 Chair for taking us through in a very deliberate  
24 fashion an analysis of this issue.

25           I applaud all of my fellow Commissioners for

1 | having voted in April to do more than just issue a  
2 | third report and bring about this change which Justice  
3 | Ginsburg referred to yesterday as a modest reduction.  
4 | It wasn't meant to be final solution, but today, as to  
5 | retroactivity, I would hope and I know that for various  
6 | different reasons my fellow Commissioners will  
7 | hopefully fully support retroactivity for those 19- to  
8 | 20,000 individuals who would benefit.

9 |           The profound reason that we should give this  
10 | retroactive application, and I say this as a Judge, as  
11 | a Commissioner, as a former prosecutor who put his life  
12 | on the line battling cocaine is that it is the right  
13 | thing to do. There is just no way to justify the ratio  
14 | that this country has continued to use even after  
15 | Commissioners in 1995 pointed out that it was wrong.

16 |           One of the deep issues that I have, being a  
17 | minority, is the issue of race, and the problem with  
18 | this issue, which I think is why we haven't come up  
19 | with a comprehensive solution, is anytime you take the  
20 | issue of race and bring it to the criminal justice  
21 | system is a very difficult situation.

22 |           I wrote an opinion in the year 2000 that says  
23 | as follows with regard to racial profiling and why we  
24 | should eliminate that. I said, "Our nation throughout  
25 | its history has continually struggled with the issue of

1 race. As we being the 21st century, it is critical  
2 that our legal system assist in the elimination of all  
3 racial discrimination. We must constantly strive to  
4 insure that race plays no role in the day to day  
5 operation of our justice system."

6 For those reasons, as well as many others  
7 that I won't even go into, I would hope that there is a  
8 unanimous vote to make this retroactive today, and that  
9 Congress still gets involved in bringing about the  
10 comprehensive solution that is badly needed so that our  
11 country can do a lot better than it is doing with  
12 regard to the issue of drug penalties in the United  
13 States.

14 CHAIR HINOJOSA: Is there any further  
15 comment? Commissioner Howell or Vice Chair Sessions?

16 COMMISSIONER HOWELL: No.

17 JUDGE SESSIONS: Oh, she can go first.

18 COMMISSIONER HOWELL: Oh, you go ahead.

19 JUDGE SESSIONS: Oh, go ahead.

20 COMMISSIONER HOWELL: Thank you. I think  
21 this is probably one of the most important decisions  
22 that the Commission's made since I've been on the  
23 Commission and I feel very honored to be serving with  
24 all of my fellow Commissioners now as we anticipate  
25 this vote.

1 I have to say that, although the Kimbrrough  
2 decision was one where the Supreme Court acknowledged  
3 all of the work that the Commission has done on the  
4 crack powder sentencing disparity and did call our  
5 amendment that became effective November 1 a modest  
6 one, it is modest, but it's significant because it's  
7 the first movement in the right direction for over a  
8 decade or in 20 years, so although modest, it's  
9 significant.

10 I do think that one of the areas where the  
11 Commission has also acknowledged in other reports its  
12 own role in contributing to the disparity by -- and I  
13 -- you know, these were prior Commissioners and, in  
14 fact, as recently as the, you know, the May 2000 summer  
15 report, as well as in the 15 year report that was  
16 issued just before I got on the Commission in 2004 did,  
17 you know, note that the guidelines themselves  
18 contributed to the disparity by pegging the mandatory  
19 minimum drug quantities at guideline levels above the  
20 otherwise application mandatory minimums so that the  
21 two level reduction, although continuing to respect the  
22 mandatory minimums articulated by and mandated by  
23 Congress, are now going to fall within guideline levels  
24 as opposed to guideline levels falling above them.

25 So although modest, I think it does, you

1 know, show that the Commission is trying to change the  
2 contribution that it has made itself to the disparity.

3 I'm not going to go through all of the  
4 different reasons for why I am supporting retroactivity  
5 of our crack amendments, but I do want to point out one  
6 of the reasons that I view it as particularly  
7 significant, and I mentioned this at our hearing last  
8 month and I think it bears repeating, and that is the  
9 words of Judge Reggie Walton who has assisted the  
10 Commission over the past two years, both as we were  
11 deciding on our crack amendment and also in his  
12 testimony on retroactivity of that amendment.

13 When he told us that the unfairness of our  
14 drug laws has had a coercive impact on the respect many  
15 of our citizens have about the general fairness of our  
16 nation's criminal justice system, I think that can't be  
17 underestimated. I was a prosecutor, as well, and this  
18 coercive effect of the perception that our criminal  
19 justice system is unfair has a totally adverse effect  
20 on our criminal justice system and our ability to  
21 enforce our criminal laws.

22 It affects the willingness of witnesses to  
23 come forward to cooperate and help the government in  
24 investigating crime. It has an effect on juries and  
25 whether or not they think that the system in which

1 they're participating is fair, and it has an adverse  
2 effect on the overall ability of law enforcement  
3 officers at all levels, federal, state and local, to  
4 combat crime.

5           It was interesting me, among the number of  
6 things that were said in both the Gald (phonetic sp.)  
7 and the Kimbrough opinion, that the Supreme Court in  
8 Gald particularly highlighted the importance of  
9 promoting the perception of fair sentencing, although  
10 the Supreme Court made that statement in a different  
11 context in describing the procedures that sentencing  
12 judges should follow.

13           I think that this perception, both the real  
14 and the perceived fairness of our criminal justice  
15 system, have been at stake in the crack powder  
16 disparity, and I hope that our decision on  
17 retroactivity will be an important step to bolster our  
18 respect for the fairness of our criminal justice  
19 system.

20           I fully support it and I also want to commend  
21 our Chairman for helping us navigate this difficult  
22 issue and my fellow Commissioners. Thanks.

23           CHAIR HINOJOSA: Thank you, Commissioner  
24 Howell. Vice Chair Sessions?

25           JUDGE SESSIONS: Thank you, Mr. Chair.

1 Twelve years ago the Commission addressed the crack  
2 powder cocaine disparity for the first time. Our  
3 report in 1995 addressed many of the concerns which led  
4 to the 100 to 1 ratio, concluding that those concerns  
5 were without substance.

6 We found back in 1995 and do today that crack  
7 cocaine sentences have generally been excessive and  
8 unwarranted. This Commission has consistently called  
9 upon Congress to reduce the 100 to 1 ratio which is, in  
10 fact, the underpinning of the mandatory minimum  
11 sentences for cocaine offenses.

12 Finally, in the spring of this year, as a  
13 result of the leadership of our Chair and the hard work  
14 of the Commission and the Commission staff, we took a  
15 modest, though important, step toward reducing crack  
16 cocaine penalties by two offense levels. Before us  
17 today is the question whether to apply those modest  
18 changes to those sentenced before November 1, 2007.

19 Applying this modest reduction to persons  
20 sentenced in the past is ultimately fair and justice  
21 probably uncontested. The fact that it is probably  
22 fair is uncontested.

23 The Commission has reduced penalties in the  
24 past for drug offenses involving marijuana, LSD and  
25 Oxycodone, offenses which are most often committed

1 statistically by white defendants. In each case, we  
2 chose to apply the reductions retroactively in the name  
3 of fairness.

4           Eighty-five percent of the persons convicted  
5 of crack cocaine offenses are African-American. These  
6 penalties have had their most dramatic impact upon the  
7 African-American families and communities within this  
8 country, and failure to follow a similar course taken  
9 by the Commission for drugs which impact other groups  
10 within our society may be taken by some as particularly  
11 unjust.

12           Moreover, in supporting retroactive  
13 application of this change to the crack guidelines,  
14 Judge Reggie Walton on behalf of the Criminal Law  
15 Committee of the Judicial Conference told us in very  
16 simple, plain words I just don't see how in good faith  
17 it is fair that just because someone was sentenced on  
18 October 30 that they get a certain sentence whereas  
19 someone sentenced on November 1 gets a different  
20 sentence. At its core, this question is one of  
21 fairness.

22           The Commission has been very concerned over  
23 the impact upon public safety as the result of the  
24 decision we are faced with today. We have taken steps  
25 to address those concerns.

1 First, reductions of sentences may be ordered  
2 only by federal judges upon review of presentence  
3 reports and pleadings of the parties. Judges will be  
4 instructed that reductions are limited to applying the  
5 two level decrease in offense levels to the guidelines.  
6 Further reductions under this provision are not  
7 permitted.

8 We've added an important public safety  
9 consideration as a factor to be considered by judges in  
10 reviewing the sentence in which judges are directed to  
11 consider the nature and seriousness of the danger of  
12 any person of the community that may be caused by a  
13 reduction in a defendant's term of imprisonment in  
14 determining whether a reduction in the defendant's term  
15 is warranted.

16 Ultimately, the responsibility for reviewing  
17 these sentences is with federal judges. Most  
18 importantly, we have delayed implementation of the  
19 retroactive application of the guidelines change, if  
20 passed today, until March 3, 2008, and the purpose of  
21 that delay is twofold: Courts will be given this  
22 period to prepare for the review of the applications  
23 made by defendants for the reduction in sentences, but  
24 second and most important of all, the Bureau of Prisons  
25 and the probation offices throughout this country will

1 | be given time to establish transition plans for persons  
2 | who may be released in the near future, including  
3 | placement of persons in halfway houses and treatment  
4 | facilities.

5 |           But let me finish with a personal comment. I  
6 | thank the Chair for his leadership and his courage. I  
7 | thank the Commissioners for their courage as well, but  
8 | also for their sense of fairness, flexibility and  
9 | unfailing desire to work together in a very collegial,  
10 | collaborative way for the good of all. This is how  
11 | non-partisan government should be conducted.

12 |           And I have served the Commission for eight  
13 | years. This is perhaps our finest hour, and I know  
14 | this is a historic day. It is the day on which we say  
15 | in a clear and unequivocal way that the system of  
16 | justice is and must always be colorblind.

17 |           CHAIR HINOJOSA: Is there any further  
18 | comment? Vice Chair Steer?

19 |           COMMISSIONER STEER: Mr. Chairman, this is,  
20 | as others have noted, a very important and I think an  
21 | historic decision, and for me it has been a difficult  
22 | one.

23 |           My analysis of the issue began, as I'm sure  
24 | it did with other Commissioners, with the statute and  
25 | the legislative history, and I just happened to bring a

1 | copy of the principle legislative history, the Senate  
2 | Judiciary Committee Report. As those of you closer in  
3 | can see, I've looked at it from time to time.

4 |           But I think that fairly read the statute and  
5 | the legislative history essentially say that if the  
6 | relevant factors are satisfied, then the statute does  
7 | seem to suggest that the Commission should authorize  
8 | retroactive application to insure insofar as  
9 | practicable that some of our offenders are similarly  
10 | punished under the law whether they are sentenced after  
11 | the amendment takes effect or before if they are still  
12 | serving a term of imprisonment.

13 |           The law requires the Commission and the  
14 | courts in a case in which retroactivity is authorized  
15 | by the Commission to carefully balance the equities in  
16 | individual cases and societal concerns, particularly  
17 | public safety.

18 |           Now the equitable considerations present in  
19 | this case argue strongly for retroactivity. I agree  
20 | with those equitable arguments except in one important  
21 | respect that may have been put forth by some.  
22 | Consistent with the Sentencing Reform Act and generally  
23 | applicable law, this decision should be based entirely  
24 | on legally relevant factors and not on the race of the  
25 | affected class of imprisoned defendants.

1           The fact that previous drug guideline  
2 amendment retroactivity decisions may have impacted  
3 different racial groups differently was not a  
4 consideration by the Commission with respect to those  
5 decisions and it provides, in my judgment, no  
6 legitimate basis for making this amendment retroactive.

7           The public safety concerns applicable to this  
8 class of offenders are also very strong. They  
9 obviously affected my decision to initially vote  
10 against the amendment based on a limited difference of  
11 opinion regarding how the amendment should have been  
12 structured.

13           That decision on prospective application  
14 having been made, however, I fully respect it and I  
15 cannot say that the public safety interests are so  
16 overwhelming of the equitable considerations that all  
17 eligible offenders should be denied relief.

18           Rather, an authorization of retroactive  
19 application will place weighty considerations on the  
20 probation officers, prosecutors and, ultimately, our  
21 very capable federal judges to insure that the  
22 interests of public safety are, to the maximum extent  
23 feasible, protected.

24           The process of releasing imprisoned inmates  
25 into society always entails some risks, but I am

1 | confident that the exercise of judicial discretion  
2 | under this amended and strengthened policy statement  
3 | that we have adopted can minimize those risks. For  
4 | these reasons, I, therefore, join in voting to apply  
5 | this amendment retrospectively.

6 | I'm very grateful to the Chair for his  
7 | leadership with respect to this issue and for calling  
8 | this meeting at this time so that I could be a part of  
9 | it, and I thank all of my Commissioner colleagues for  
10 | the very thoughtful, responsible and careful judgments  
11 | that they have brought to this issue.

12 | CHAIR HINOJOSA: Thank you, Vice Chair Steer.  
13 | Commissioner Horowitz?

14 | COMMISSIONER HOROWITZ: Just briefly. I've  
15 | had the opportunity to serve on this Commission now for  
16 | four plus years and, as other Commissioners have spoken  
17 | to this issue of the importance of this vote, this is  
18 | certainly the most important matter during my time on  
19 | the Commission that we've taken up and probably one of  
20 | the most important votes that this Commission has taken  
21 | up in its 20 year history.

22 | I, too, will be supporting the change to make  
23 | this guideline retroactive and just want to speak  
24 | briefly as to my reasons for doing so.

25 | First and foremost as someone who is a former

1 federal prosecutor, but who was not involved in  
2 prosecuting many drug cases during my time, I was  
3 struck both during the hearings that we had last year  
4 in considering the original decision to reduce the  
5 guidelines and also the hearings that we held with  
6 regard to retroactivity about how much unanimity there  
7 was with regard to the view that the 100 to 1 ratio is  
8 without support.

9           There was virtually no one who came forward  
10 to us and said that the 100 to 1 made sense, whether  
11 from a scientific standpoint or from any other  
12 prospective, and I was struck by the fact that really  
13 that viewpoint cut across political lines and liberal  
14 and conservative lines.

15           And so we moved forward with the change  
16 driven by what was perceived as an unwarranted ratio  
17 that was in our guideline system and then the question  
18 became do you apply that retroactively to what appears  
19 to be about 19,500 people still in prison, and I've  
20 come to the conclusion for the same reasons that we  
21 decided to change the guideline amendment, to reduce it  
22 by two levels, that that same rationale should apply to  
23 those currently in jail and who were sentenced using  
24 the 100 to ratio that existed in our guidelines.

25           And I've also come to that conclusion in

1 part, as Commissioner Steer indicated, because of the  
2 change we make today to 1B1.10 which clarifies what the  
3 standards are and what judges should consider as  
4 they're deciding whether or not to apply this  
5 retroactively, the important point being that what we  
6 are doing today is not deciding that 19,500 inmates are  
7 entitled to a two level reduction but, rather, that all  
8 of these individuals are eligible for that reduction,  
9 and that, I think, is a very important distinction as  
10 we go forward and as we consider what to do here.

11           And, in particular, we have heard comments.  
12 We've received over 30,000 comments as a commission  
13 about this retroactivity issue, and those opposed have  
14 focused on the safety to the community with allowing  
15 certain of the inmates who will be eligible for this  
16 reduction to be granted a reduction in sentence and  
17 that, of course, is a serious and important concern.

18           And what we've done by modifying Section  
19 1B1.10 is to make clear what I think was already known,  
20 obviously, to federal judges, but to make explicit and  
21 clear to federal judges which is that not everybody is  
22 automatically entitled to this reduction.

23           Rather, each federal judge across the country  
24 will now be obligated to turn to each individual  
25 defendant and individually decide whether that person

1 | should or should not be granted a reduction in  
2 | sentence. That, in part, will turn on the individual's  
3 | underlying offense and their danger to the community,  
4 | and I fully expect, and I think my fellow Commissioners  
5 | fully expect, that a number of individuals who are a  
6 | danger to the community will not, in fact, receive any  
7 | reduction in sentence, but that, of course, if for each  
8 | federal judge to decide and that will be done across  
9 | the country going forward from here as time goes by.

10 |           And so in light of the fact that this is not  
11 | a get out of jail free card in any means, but rather a  
12 | fairness issue that derives from our previous decision,  
13 | I think it's appropriate to make this decision to apply  
14 | the earlier guideline amendment retroactive. It will  
15 | provide some greater sense of fairness, as the Supreme  
16 | Court said yesterday, a modest change. There is more  
17 | significant work that can be done in this regard.  
18 | That, of course, will be Congress's determination, but  
19 | we here today I think make an important but modest step  
20 | in doing that.

21 |           And for that I also want to congratulate the  
22 | Chair who has worked extraordinarily hard in the last  
23 | two years to see us reach today and to move forward in  
24 | this regard, and I want to thank my fellow  
25 | Commissioners, as well.

1 CHAIR HINOJOSA: Thank you, Commissioner  
2 Horowitz. Commissioner Friedrich?

3 COMMISSIONER FRIEDRICH: Yes, Mr. Chairman.  
4 The decision to apply Amendment 706 retroactively is an  
5 important and difficult one for the Commission. It  
6 affects a great number of lives, both those in our  
7 communities as well as those in the criminal justice  
8 system.

9 After much thought and careful deliberation I  
10 have concluded that this amendment should be applied  
11 retroactively. My conclusion is based in large part on  
12 the recommendation of the federal courts as well as the  
13 Commission's own precedents.

14 Under 28 U.S.C. 994U, Congress has granted  
15 the Commission the authority to decide whether to apply  
16 its guideline amendments retroactively. To date, the  
17 Commission has given retroactive effect to  
18 approximately 25 guideline amendments, including  
19 several in the drug area.

20 While I recognize the impact that  
21 retroactivity may have on the safety of communities, as  
22 well as the administrative burden for the federal  
23 courts, I believe that sound policy grounds support our  
24 decision today.

25 For more than a decade the Commission has

1 maintained that the 100 to 1 drug quantity ratio that  
2 applies to powder and crack cocaine offenses undermines  
3 Congressional objectives set forth in the Sentencing  
4 Reform Act. The Commission's findings and  
5 recommendations on this subject have been based on  
6 extensive research and data. The Commission has not  
7 been alone in its criticism of the penalty structure  
8 for crack cocaine offenses. To the contrary, the  
9 criticism of the crack penalty scheme has been  
10 widespread.

11           This year the Commission proposed a modest  
12 amendment that was designed to fit within the existing  
13 statutory penalty scheme. The amendment, which reduces  
14 the base offense levels associated with each quantity  
15 of crack by two levels, became effective on November 1  
16 of this year and it corrects what the Commission viewed  
17 as its contribution to the unwarranted disparity  
18 associated with the 100 to 1 drug quantity ratio, and  
19 that the Commission had set base offense level  
20 guidelines ranges for crack offenses at levels that  
21 exceeded rather than included the statutory mandatory  
22 minimum penalties set by Congress.

23           As a result of this amendment, some crack  
24 defendants will be eligible for sentencing reductions  
25 that will make their sentences between two and five

1 times longer than the sentences for equal amounts of  
2 cocaine powder.

3           The purpose of the Commission's amendment, to  
4 ameliorate an unwarranted disparity between the  
5 penalties applicable to crack and powder cocaine  
6 offenses, applies equally to defendants who were  
7 sentenced prior to November 1 of this year as to future  
8 defendants. For this reason as the Criminal Law  
9 Committee, the Federal judiciary concluded in its  
10 recent letter to the Commission the purpose behind the  
11 amendment weighs in favor of applying the amendment  
12 retroactively.

13           As I mentioned, I am concerned about the  
14 impact that retroactivity may have on the safety of  
15 communities. The witnesses who testified at our recent  
16 hearing on retroactivity made compelling points about  
17 the dangers that some defendants will pose to these  
18 communities. These risks are real and should be taken  
19 seriously.

20           However, our decision to apply the crack  
21 amendment retroactively does not mean that all  
22 defendants who are eligible for reduction in sentence  
23 based on the crack amendment will be released from  
24 prison early. As the Criminal Law Committee pointed  
25 out in its recent letter to the Commission, reductions

1 in sentences pursuant to 18 U.S.C. 3582(c) are not  
2 automatic. These decisions are left to the sound  
3 discretion of federal judges. No defendant will be  
4 eligible for release under this amendment without prior  
5 judicial approval.

6 Under 3582(c), each judge will have to assess  
7 each defendant's eligibility for reduction based on the  
8 unique facts of the case. We fully expect and, indeed,  
9 our revised policy statement Section 1B1.10 directs  
10 federal judges to consider in each case both the nature  
11 and seriousness of the danger to any person or the  
12 community that may be posed by a reduction in the  
13 defendant's term of imprisonment in deciding whether to  
14 reduce the defendant's sentence.

15 I also recognize that retroactive application  
16 to crack amendment poses substantial administrative  
17 burdens for the federal courts. For this reason, we  
18 have followed the recommendation of the federal courts  
19 and we have implemented procedures to minimize these  
20 burdens.

21 In particular, we have amended Section  
22 1B1.10, the policy statement that applies to reductions  
23 in sentences pursuant to 18 U.S.C. 3582(c), to make  
24 abundantly clear that motions for reductions under  
25 3582(c) do not constitute full scale resentencings.

1 The only subject that will be under consideration when  
2 a Court reviews a defendant's motion for a sentencing  
3 reduction based on retroactive application of the crack  
4 amendment is the change in the crack guidelines.

5 Section 1B1.10 expressly provides that in  
6 considering a motion for reduction pursuant to 3582(c),  
7 a Court shall substitute only the amendment for the  
8 corresponding guideline provisions that were applied  
9 when the defendant was initially sentenced, and it  
10 shall leave all other guideline application decisions  
11 unaffected.

12 In other words, retroactive application to  
13 crack amendment will entitle some crack defendants to a  
14 two level reduction, but no more. Pursuant to our  
15 amendment, defendants will not have the right to a full  
16 resentencing under the advisory guideline scheme  
17 established by the Supreme Court in the Booker  
18 decision.

19 Furthermore, Section 1B1.10 makes clear that  
20 a defendant will not be entitled to any reduction under  
21 3582(c) if application of the crack amendment does not  
22 lower the defendant's guideline range because of the  
23 operation of another guideline such as the career  
24 offender guideline or a statutory provision such as the  
25 statutory mandatory minimum term of imprisonment.

1           Finally, as I've already noted, reductions  
2 under 3582(c) based on retroactive application to crack  
3 amendment will not be automatic. They will be based on  
4 the judgments of Federal District Court judges.  
5 Federal judges will have to decide based on the facts  
6 of each case, first, whether a reduction is warranted  
7 at all and, second, whether the full two level  
8 reduction contemplated by the amendment is appropriate  
9 or some portion thereof.

10           While we estimate, based on the sentencing  
11 data that we have been provided by the federal courts  
12 to date, that over three decades approximately 19,500  
13 offenders will be eligible for reduction in sentence  
14 based on retro application of the crack amendment, the  
15 federal courts and their probation officers in their  
16 support of retroactivity have represented to us that  
17 they can absorb the influx of work that will be  
18 associated with the retroactive application of the  
19 amendment. This is because resentencings under 3582 do  
20 not require the presence of defendants, nor do they  
21 require the preparation of new presentence reports.  
22 Reductions under 3582(c), where warranted, can be  
23 recorded as a simple order.

24           Today we also vote to delay the effective  
25 dates of our amendment until March 3rd, 2007 to give

1 affected parties, including the courts, the probation  
2 officers, the Bureau of Prisons, defense attorneys and  
3 prosecutors adequate time to prepare for the surge in  
4 motions and corresponding early releases that will  
5 likely occur as a result of the Commission's decision  
6 to apply Amendment 706 retroactively.

7           We anticipate that this delay will give the  
8 Bureau of Prisons and the Office of Probation and  
9 Pretrial Services time to begin necessary prerelease  
10 planning, including identifying the risks and the needs  
11 of potentially eligible defendants before they are  
12 released from prison. This delay should also give the  
13 Department of Justice and defense attorneys ample time  
14 to reach agreements in a substantial number of cases.

15           Additionally, the delay in effective date  
16 will insure that Congress has the opportunity to be  
17 heard on this issue. Recognizing that Congress is the  
18 principle policy maker with respect to federal  
19 sentencing, we have endeavored to be transparent  
20 throughout this process. By delaying the effective  
21 date of this amendment, we are also giving Congress  
22 adequate time to consider our decision to apply  
23 Amendment 706 retroactively.

24           CHAIR HINOJOSA: Thank you, Commissioner  
25 Friedrich. Commissioner Ferry?

1                   COMMISSIONER FERRY: The Department of  
2 Justice maintains its opposition to retroactive  
3 application of the crack amendments. As we've stated  
4 on numerous occasions, including in our testimony on  
5 November 13th, we believe that retroactive application  
6 and the reduction in sentences for these offenders pose  
7 significant safety risks for the communities where  
8 they'll be returned. The estimated 20,000 offenders  
9 approximately that are eligible for this reduction is  
10 far greater than anything else the Commission has ever  
11 considered.

12                   We have concerns about the burdens on the  
13 court system associated with a retroactive application,  
14 but I must note that we appreciate the Commission's  
15 sincere efforts to resolve some of these concerns,  
16 particularly the burdens upon the court system, the  
17 public safety concerns and the uncertainty surrounding  
18 the legal proceedings by which this would be done.  
19 Nevertheless, our concerns remain.

20                   Finally, in dealing with those 19,500  
21 estimate eligible offenders as well as those many  
22 offenders who will file for reduction in sentence and  
23 are not eligible for reduction, the courts and  
24 prosecutors necessarily will be diverted from focusing  
25 upon current crime and the prosecution of those cases.

1           We appreciate the Commission's efforts to  
2 address our concerns, but those concerns nevertheless  
3 remain.

4           CHAIR HINOJOSA: Thank you, Commissioner  
5 Ferry. Commissioner Reilly?

6           COMMISSION REILLY: Thank you, Mr. Chairman.  
7 I feel compelled to say a few things because obviously  
8 as my colleague, Commissioner Steers, is aware, I have  
9 been a member ex officio and I'm thankful I do not have  
10 a vote because I realize the difficult question that is  
11 before the Commission, but for the past 12 years  
12 approximately I have listened to the debate and I am  
13 familiar with all three of the reports because I have  
14 been a member off and on of this Commission during the  
15 passage of those studies.

16           I think I'd like to say that as it regards  
17 decisions that those of us who have been appointed to  
18 the positions that we occupy, the respective positions  
19 we occupy, there is never really an easy decision as  
20 there isn't either for members of the Congress who are  
21 elected to serve here.

22           I would say that on behalf of the Parole  
23 Commission, which the Sentencing Commission abolished a  
24 number of years back, and I suppose the reason I'm  
25 still here is because we've been given other

1 assignments, but there are never any decisions that we  
2 make that really do not have a major impact on the  
3 lives of others, and certainly the decision being made  
4 here today has a great impact on the lives of many.

5 Inquiring of my own staff yesterday about the  
6 guideline changes of the U.S. Parole Commission over  
7 the course of 30 years that they've operated a  
8 guideline system, and the feds or really the federal  
9 government was the one that really established the idea  
10 of guidelines, if you will, and from that evolved the  
11 U.S. sentencing guidelines.

12 But I'm advised that in that period of time  
13 and I think I'm correct, that any changes that were  
14 made in the guidelines by the United States Parole  
15 Commission have been applied retroactively, so there is  
16 some precedent from the standpoint of as we do make  
17 those changes that those governing bodies that are in  
18 -- which were in charge at that time address that  
19 issued.

20 And certainly I commend my fellow  
21 Commissioners who I know had paid very close attention  
22 to all of the testimony that we've all heard and that  
23 I've heard over the course of 12 years about the issue.  
24 And I commend the Chairman for the leadership that he  
25 has provided because I've had an opportunity to serve

1 | now under four Chairs of this Commission, including the  
2 | one who had to establish the Commission, find its  
3 | headquarters here in this marvelous building and hired  
4 | the staff that make up and compose the Commission  
5 | today.

6 |           So I think the number one thing that we  
7 | always have kept certainly in the mission statement of  
8 | the Parole Commission and I think it's certainly been  
9 | prevalent in the statements that have been made here  
10 | today is the impact of public safety, and that is a  
11 | major impact and a question and an issue that we all  
12 | have, we all share and we all want to make sure that  
13 | whatever actions we take, whether it's the Parole  
14 | Commission, the Sentencing Commission or any other  
15 | legislative body, keep foremost in mind the importance  
16 | of public safety on the commitment we have to our  
17 | fellow citizens.

18 |           So I just wanted to make those statements,  
19 | Mr. Chairman, and thank you for your leadership and  
20 | your guidance of this very difficult subject.

21 |           CHAIR HINOJOSA: Thank you, Commissioner  
22 | Reilly. That means everyone has spoken except myself,  
23 | and I will pass the gavel to Vice Chair Steer while I  
24 | make some comments.

25 |           I won't start off by congratulating myself,

1 | but I will say that I have been on the bench almost 25  
2 | years -- well, it will be 25 years this coming May, and  
3 | I do have a 1979 Volkswagen convertible as one of my  
4 | vehicles.

5 |           When I took the bench many years ago, I  
6 | didn't think that sentencing would be as difficult as  
7 | it is when you actually have to do it, and I've said  
8 | over and over again that the reason that it is  
9 | difficult is because as a judge, when you're the  
10 | sentencing judge, you have to make a decision that  
11 | affects the defendant before you as well as the  
12 | defendant's family and, just as much, the public in  
13 | general.

14 |           And in Federal Court we usually don't have  
15 | actually victims in the courtroom because many of the  
16 | federal crimes involve society as a whole as the  
17 | victim, so it's a difficult process trying to make the  
18 | decision with regards to each sentence and whether it  
19 | is not more than necessary but sufficient with regards  
20 | to each individual case.

21 |           As a result of the disparity in the different  
22 | sentences that so many of us who are judges were  
23 | imposing, at least during the first five years that I  
24 | was a judge, we had the Sentencing Reform Act of 1984,  
25 | a bipartisan act. That's a strange word sometimes in

1 recent memory to some of us, but it certainly was not  
2 in 1984. It took about ten years to get it passed.

3 Two of the main sponsors, Senators Kennedy  
4 and Hatch, continue to act on a bipartisan nature with  
5 the very issue before us and are an example for the  
6 rest of us with regards to how we all should act when  
7 it comes to the criminal justice system.

8 And I say that from experience because I  
9 myself am the product of a bipartisan family, a very  
10 Republican mother and a very Democratic father, but I  
11 will say that we also spoke about politics in general  
12 and public affairs on a regular basis and dinner was  
13 sometimes not a pleasant affair, but I will say that I  
14 never heard them disagree on issues with regards to the  
15 criminal justice system and education. Those are  
16 issues that we all can find common ground.

17 And, certainly, the idea behind the  
18 Sentencing Reform Act of 1984 was that a bipartisan  
19 Commission, an independent agency within the judiciary,  
20 would be created with seven members of the Commission  
21 appointed by the President, two ex officio members, and  
22 that they would serve staggered terms and that you  
23 would not have more than four members of one party at  
24 any one time on this Commission.

25 Independent because, although we're in the

1 middle of a political storm on a pretty regular basis  
2 with regards to people coming to us and either  
3 criticizing us from one of the three branches or the  
4 public or families of defendants, at the same time  
5 we're independent because we're taking input from the  
6 three branches, taking input from the public in general  
7 and trying to be the traffic police.

8           That brings us all together in a non-partisan  
9 fashion without any political pressure to try to make  
10 the correct decision on a basis with regards to  
11 guidelines that would apply for the entire country with  
12 regards to each federal crime, realizing that these are  
13 guidelines that are give on a wholesale level and that  
14 judges on a retail level administer them with regards  
15 to each case.

16           One of the important things that you receive  
17 with regards to sentencing as a trial judge are  
18 comments that you receive in letters. I will say that  
19 sentencing about 6- or 700 people a year, I do not pass  
20 sentence without reading every single letter with  
21 regards to that defendant.

22           I will say that I appreciate on behalf of the  
23 Commission the over 33,000 letters that we have  
24 received here. I have to be honest and indicate I have  
25 not read every single one of those 33,000 letters.

1 | However, they have been summarized for us and I have  
2 | read a sampling of them and they have been helpful.

3 |           It has also been helpful to keep in mind  
4 | those individuals who did not write, especially the  
5 | public in general with regards to what might be  
6 | important for them and their safety.

7 |           I also want to thank all the advocacy groups  
8 | who have helped us with regards to giving advice. I  
9 | want to thank those individuals who came from the  
10 | public, who considered themselves parts of communities  
11 | and who feel that the burdens of crime affect their  
12 | communities, and I want to thank the members of the  
13 | Criminal Law Committee and the Judicial Conference with  
14 | regards to the input that they give us on all the issue  
15 | before us.

16 |           In taking the action that we are about to  
17 | take, I will say that we are confident that the judges  
18 | in this country who have always in the history of this  
19 | nation taken the interest of the public in general with  
20 | regards to what they do in the courtrooms will continue  
21 | to do so with regards to how they decide on an  
22 | individual basis whether someone is entitled to a  
23 | retroactive application of a guideline amendment.

24 |           It is a difficult thing for them to have to  
25 | make these decisions but, as always, the District Court

1 judges are ready and willing to take that on, and this  
2 Commission feels confident that they will be able to  
3 take those interests into effect and will be able to do  
4 so.

5           We continue to say that this is a modest,  
6 partial step, whatever you want to call it. We have  
7 always said that. Ultimately in our system of  
8 government Congress makes the decisions with regards to  
9 the ultimate way in which an individual should be  
10 sentenced, and I must say that we continue to call on  
11 Congress to continue to revisit this particular issue  
12 in a bipartisan way with regards to the powder and  
13 crack ratio. We continue to be hopeful that Congress  
14 will act in a bipartisan fashion to correct this  
15 serious problem.

16           I want to thank my fellow Commissioners who  
17 have worked very hard on this particular issue. It is  
18 a difficult issue, and we all know that. It is one  
19 that gets a lot of reaction and a lot of comment.

20           There is one Commissioner I want to  
21 especially thank and that's Vice Chair Steer. No one  
22 on this Commission has been involved with this issue  
23 more than he has nor over a longer period of time, and  
24 he always approaches the issue with an open mind and  
25 never hesitates to change his mind when he feels it's

1 appropriate.

2           And so I thank all of the Commissioners with  
3 regards to the work they have done. I thank the staff  
4 with our able director, Judy Sheon, at the helm. I  
5 cannot explain the amount of time that they spent on  
6 this issue as well as on the other issues. As the  
7 Commission continues to act with regards to every  
8 single guideline amendment or new guideline, every  
9 single one of them gets put to the same test that this  
10 particular issue has. Not all of them have the same  
11 openness nor the same public interest as this one does,  
12 but they all get the same amount of interest on our  
13 part and the same amount of attention.

14           And I'd like to close by saying that we are  
15 about to have a roll call vote. There will be strong  
16 feelings on both sides of this issue, and on behalf of  
17 the Commission, I urge those who have a reaction to  
18 please react on principle and not on politics, to  
19 please react with regards to if you have views on this  
20 one way or another, express those views, but not with  
21 regards to any attempt at gaining any political  
22 advantage over an issue that in the end has no sides in  
23 politics other than justice.

24           And so, again, I thank every one of you who  
25 have shown an interest and the staff and certainly the

1 Commissioners, and I will call for a roll call vote at  
2 this point.

3 MS. SHEON: On the motion before you, Vice  
4 Chair Castillo?

5 JUDGE CASTILLO: Yes.

6 MS. SHEON: Vice Chair Sessions?

7 JUDGE SESSIONS: Yes.

8 MS. SHEON: Vice Chair Steer?

9 COMMISSIONER STEER: Yes.

10 MS. SHEON: Commissioner Horowitz?

11 COMMISSIONER HOROWITZ: Yes.

12 MS. SHEON: Commissioner Howell?

13 COMMISSIONER HOWELL: Yes.

14 MS. SHEON: Commissioner Friedrich?

15 COMMISSIONER FRIEDRICH: Yes.

16 MS. SHEON: Chair Hinojosa?

17 CHAIR HINOJOSA: Yes.

18 MS. SHEON: The ayes are seven and the nays  
19 are zero.

20 (Applause)

21 CHAIR HINOJOSA: As far as the amendment  
22 goes, I think that concludes that action before the  
23 Commission. Is there a motion to adjourn the meeting?

24 UNIDENTIFIED SPEAKER: So moved.

25 CHAIR HINOJOSA: Is there a second?

1 UNIDENTIFIED SPEAKER: I'll second.

2 CHAIR HINOJOSA: All those in favor say so by  
3 voting aye.

4 (Aye by all)

5 CHAIR HINOJOSA: Opposed?

6 (No response)

7 CHAIR HINOJOSA: The motion carries.

8 (Whereupon, at 4:39 p.m., the foregoing  
9 proceeding was adjourned.)

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## 1 CERTIFICATE

2 This is to certify that the attached  
3 proceeding before:  
4

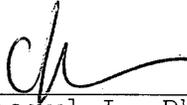
5 UNITED STATES SENTENCING COMMISSION  
6

7 PLACE: Washington, D.C.

8 DATE: December 11, 2007  
9

10 was held according to the record, and that this is the  
11 original, complete, true and accurate transcript which  
12 has been compared to the recording accomplished at the  
13 hearing.  
14

15   
16 \_\_\_\_\_  
17 Dominio Quattrociochi  
18 Court Reporter

19   
20 \_\_\_\_\_  
21 Cheryl L. Phipps  
22 Transcriber  
23  
24  
25